IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 44 of 1995

For Approval and Signature: Sd/-

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NARAN VIRJI GALA

Versus

STATE OF GUJARAT

Appearance:
MR KJ SHETHNA for Appellant
MS NANDINI JOSHI APP for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE H.H.MEHTA

Date of decision: 21/03/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. In this appeal, which is filed under Section

374(2) of the Code of Criminal Procedure, 1973, the appellant has challenged the legality of judgment dated November 15, 1994 rendered by the learned Additional Sessions Judge, Kutch-Bhuj, in Sessions Case No.46 of 1993, by which the appellant is convicted of the offences punishable under Sections 302 and 201 of the Indian Penal Code and punished with imprisonment for life as well as fine of Rs.1,000/-- in default simple imprisonment for six months for the offence punishable under Section 302 of the Indian Penal Code and simple imprisonment for three years and fine of Rs.1,000/-, in default simple imprisonment for six months for the offence punishable under Section 201 of the Indian Penal Code. We may state that substantive sentences are ordered to run concurrently.

2. The complainant i.e. Mandan Gunsi is resident of Mumbai. His daughter named Shantaben was married to the appellant. The native place of the appellant is village Samkhiyari, District : Kutch-Bhuj. One Haresh Laxmidas is running a Sweet Shop in the name and style of Main Sweet Mart, Andheri, Mumbai. Deceased Shantaben was purchasing sweets from the said shop off and on. The deceased had developed a soft feeling for Haresh Laxmidas, but Haresh Laxmidas was not aware about the sentiments of the deceased nor had developed any liking for the deceased. The deceased was telephoning Haresh Laxmidas, but was not speaking anything, when Hareshbhai was lifting the receiver. Therefore, Haresh Laxmidas had lodged a complaint with Telephone Department, as a result of which his telephone was placed under observation and after sometime, he was informed that the deceased was telephoning him. On learning about the one sided love of the deceased for Haresh, the appellant had scolded her, as a result of which, in an attempt to commit suicide, the deceased had consumed poison and was admitted in the dispensary of Dr. Jayesh Ratilal Balsara, at Mumbai. After 15 days of the said incident, the appellant had brought the deceased to his native place at Samkhiyali. The incident in question is alleged to have taken place on February 23, 1993. We may state that the native village of father of the deceased is Adhoi, which is situated near Samkhiyali. At village Adhoi, the father of the deceased had arranged a social function and invited the appellant and the deceased to participate in the same, but neither the appellant had participated in the same, nor permitted the deceased to participate. After the function was over, the father of the deceased was to leave village Adhoi for Mumbai, but in the morning on February 23, 1993, the father of the deceased was informed at village Adhoi that his daughter had committed

suicide. The father of the deceased had, therefore, conveyed necessary information at Adhoi Police Station, where the information given by the father of the deceased was registered as Accidental Death Case No.3/93. Meanwhile, the appellant had taken the dead body of deceased Shantaben to crematorium and lit the pyre but before the dead body was fully cremated, the police had gone to the crematorium ground and extinguished the fire. Thereafter, the Executive Magistrate was called at the crematorium and in the presence of panch witnesses an inquest was held on the dead body of the deceased. While holding inquest on the dead body, it was found that the dead body had ligature marks as well as other injuries and in order to ascertain the cause of the death of the deceased, necessary arrangement was made to send the dead body to the Hospital for postmortem examination. The photographer was also called at the crematorium, who had taken the photographs of the dead body of the deceased, which are produced on record of the case. The Police Officer had, thereafter, prepared the panchnama of the place of the incident, which was the house of the appellant. On examination of the place of the incident, the panch witnesses and Police Officers were of the opinion that there were no signs in the room, which indicated that the deceased had committed suicide. Further, during the course of preparation of panchnama of the place of incident, a blood stained coir string was also found, which was seized, while preparing the panchanama. The postmortem examination of the deceased was conducted by a penal of Doctors consisting of Dr.Meghji Dhanji Shamalia and Dr.Nitin Virabhai Vinzoda. The postmortem examination of the deceased indicated that the deceased had died due to asphyxia, resulting from strangulation. The investigation into the case was taken over by Mr.A.K.Tomar, who was then Assistant Superintendent of Police. The Investigation revealed that the appellant had strangulated the deceased and caused her to death. Therefore, P.S.I Shri N.B.Jadeja of Adhoi Police Station had lodged the complaint and sent the incriminating articles, which were seized during the course of investigation, to Forensic Science Laboratory for analysis. On completion of investigation, the appellant was chargesheeted of the offences punishable under Sections 302 and 201 of the Indian Penal Code in the Court of learned Judicial Magistrate First Class, Bhachau. As the offence punishable under Section 302 of the Indian Penal Code is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Kutch-Bhuj for trial where, it was numbered as Sessions Case No.46 of 1993.

3. The learned Judge had framed charge at Ex.1 against the appellant of the offences punishable under Sections 302 and 201 of the Indian Penal Code. The charge was read over and explained to the appellant, who had not pleaded guilty to the same and claimed to be tried. The prosecution had, therefore, examined [i] Dr.Jayesh Ratilal Balsara, P.W.1, Ex.9, [ii] Haresh Laxmidas, P.W.2, Ex.10, [iii] Mandan Gunasi, P.W.3, Ex.14, [iv] Kheraj Manasi, P.W.4, Ex.18, [v] Velji Harkha, P.W.5, Ex.19, [vi] Parvatiben Shantilal, P.W.6, Ex.20, [vii] Dr.Meghji Dhanji Shamalia, P.W.7, Ex.23, [viii] Ramanikgiri Devgiri Goswami, P.W.8, Ex.26, [ix] Dayaram Shambhu, P.W.9, Ex.28, [x] Puriben Ratansinh, P.W.10, Ex.29, [xi] Premji Damji, P.W.11, Ex.32, [xii] Karman Bhuga, P.W.12, Ex.33, [xiii] Prabhaben Shivji, P.W.13, Ex.34, [xiv] Dr.Mansukhlal Bapubhai Satta, P.W.14, Ex.35, [xv] Champuben Virjee, P.W.15, Ex.37, [xvi] Dr.Nitin Virabhai Vinzoda, P.W.16, Ex.39, [xvii] Ranchhod Arjan, P.W.17, Ex.41, [xviii] Abdul Kadar Jusab Bhatti, P.W.18, Ex.42, [xix] Gajanand alias Jagdish Hariram, P.w.19, Ex.44, [xx] Rohatasing Arjunsing, P.W.20, Ex.49, [xxi] Narendrasinh Bharatsinh Jadeja, P.W.21, Ex.51, and [xxii] Ajaykumar Karanpalsinh Tomar, P.W.22, Ex.54 to prove its case against the appellant. The prosecution had also produced documentary evidence such as complaint filed by Mandan Gunasi regarding accidental death of his daughter at Ex.14, P.M.Notes of the deceased at Ex.24, the map of the place of incident at Ex.27, the arrest panchnama of the appellant at Ex.30, the certificate issued by Dhanvantri Nursing Home at Ex.36, the inquest panchnama at Ex.43, abstract of the station diary at Ex.50, panchnama of the place of incident at Ex.52, the report of the serologist at Ex.60 etc., in support of its case against the appellant.

4. After recording of the evidence of the prosecution witnesses was over, the learned Judge had explained to the appellant, the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement, as required by Section 313 of the Criminal Procedure Code, 1973. In his further statement, the case of the appellant was that of total denial, but he had not examined any witness in his defence.

5. On appreciation of the evidence adduced by the prosecution, the learned Judge noticed that the incident in question was witnessed, by no one and that no direct evidence regarding commission of murder of the deceased by the appellant was tendered before the Court. Placing reliance on the evidence led by the prosecution, the

learned Judge held that the following circumstances were proved by the prosecution beyond reasonable doubt. [i] The deceased had one sided love for Haresh and, therefore, the relations between the deceased and the appellant were strained; [ii] Because of the strained relations, the deceased had attempted to commit suicide at Mumbai; [iii] Within 15 days of the said incident, the appellant in the company of the deceased had come to his native village Samkhiyali from Mumbai; [iv] The father of the deceased, who had come to his native village Adhoi from Mumbai had arranged a social function at village Adhoi and had invited the appellant and the deceased to participate, but neither the appellant had participated in the said function nor permitted the deceased to participate; [v] The incident in question had taken place during the night hours of February 22/23 1993 and the evidence of Dr.Shamalia as well as that of Dr.Vinzoda establishes that the deceased had died a homicidal death; [vi] After committing the murder of his wife, the appellant had gone to the Railway Station of village Samkhiyari to see off his sister-in-law and had, thereafter, gone to temple, where his mother had gone and thus, a systematic attempt was made by the appellant to create an alibi; [vii] After informing the complainant, who is father of the deceased about the death of the deceased, the appellant had not waited for him and not only removed the dead body of the deceased to the crematorium, but had lit the pyre.

After holding that the above referred to circumstances were proved by the prosecution beyond shadow of doubt, the learned Judge held that it was proved by the prosecution that in all human probability the act of the murder of the deceased was done by the appellant and the appellant alone. In view of these conclusions, the learned Judge has convicted the appellant under Sections 302 and 201 of the Indian Penal Code and imposed punishment, which is referred to earlier, by the judgment dated November 15, 1994 giving rise to the present appeal.

6. Mr.K.J.Shethna, learned counsel for the appellant, after taking us through the entire evidence on record pleaded that the circumstances sought to be relied upon by the prosecution are not fully established and, therefore, the appellant is entitled to a reasonable benefit of doubt. The learned counsel for the appellant emphasized that Ex.16, which is card issued from Ghatkopar Maternity & Surgical Hospital of Dr.L.M.Shah on September 19, 1985 indicates that the blood group of the deceased was "O"+, whereas the report of the Serologist

indicates that the blood group of the deceased was "B"+ and, therefore, it is not established by the prosecution that the doctor had performed the postmortem of the dead body of deceased Shantaben. In the alternative, it was urged that the evidence of Dr.Shamalia read with that of Dr.Vinzoda does not establish that the deceased had died a homicidal death and, therefore, the appellant is entitled to acquittal. The learned counsel for the appellant submitted that the prosecution has failed to establish the motive for commission of crime, which is one of the most important ingredients in a case based on circumstantial evidence and, therefore, the judgment impugned in the appeal should be reversed. What was stressed on behalf of the appellant was that the appellant had taken care of the deceased as a loving husband, when deceased had attempted to commit suicide and, therefore, the case of the prosecution that the appellant had strangulated the deceased to death should have been disbelieved by the learned Judge. It was argued that even the father of the deceased was satisfied that the deceased had committed suicide and, therefore, at his instance, accidental case was registered and was investigated and in absence of reliable evidence led by the prosecution, the appellant should not have been convicted under Section 302 of the Indian Penal Code. The main thrust of the argument of the learned counsel for the appellant was that the evidence on record does not establish that the ligature injuries sustained by the deceased were sufficient in ordinary course of nature to cause her death and as at the best, knowledge can be attributed to the appellant that the ligature injuries caused by him were likely to cause death of the deceased, the offence committed by him should be held to be one punishable under Section 304, Part-I or Part-II of the Indian Penal Code and not under Section 302 of the Indian Penal Code.

7. Ms.Nandini Joshi, learned APP for the State contended that the evidence of the prosecution witnesses proves beyond reasonable doubt that as one sided love of the deceased for Haresh had become known to the appellant, the appellant had scolded her and, therefore, the deceased had attempted to commit suicide at Mumbai, which in turn establishes that the relations between the appellant and the deceased were strained. The learned APP emphasized that in order to achieve his ill-design, the appellant had brought the deceased to his native village Samkhiyari and had murdered her by strangulating her. The learned APP for the State argued that the circumstances, which according to the learned Judge of the trial Court are established by the prosecution are

borne out from the evidence of the witnesses and, therefore, it is wrong to contend that the circumstances, which are sought to be relied on by the prosecution against the appellant are not established. According to the learned APP the evidence of Dr.Shamalia read with that of Dr.Vinzoda establishes beyond reasonable doubt that the deceased had died a homicidal death and as other evidence on record such as inquest panchnama and panchnama of the place of incident rule out suicide by the deceased, the claim advanced on behalf of the appellant that it was not established by the prosecution that the deceased had died a homicidal death should not be accepted. According to the learned APP, the cumulative effect of the circumstances proved on record of the case establishes beyond reasonable doubt that in all human probability, the act of commission of murder of the deceased was done by the appellant and the appellant alone and, therefore, the appeal should be dismissed. In answer to the alternative plea raised by the learned counsel for the appellant to the effect that the offence committed by the appellant should be held to be one punishable under Section 304, Part-I or Part-II of the Indian Penal Code, the learned APP for the State pleaded that a reasonable reading of the evidence of Dr.Shamalia with that of Dr.Vinzoda and P.M.Note establishes that the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause her death and, therefore, the conviction of the appellant under Section 302 of the Indian Penal Code should be upheld by the Court. The learned APP emphasized that after committing murder of the deceased, the appellant had removed the dead body to crematorium ground and lit the pyre and as he had caused the evidence of commission of offence of murder by him to disappear with the intention of screening himself from legal punishment, the conviction of the appellant under Section 201 should also be upheld by the Court.

We have taken into consideration the submissions advanced at the Bar and reappreciated the whole evidence on record. It is relevant to notice that the prosecution has not claimed that the incident in question was witnessed by any one and direct evidence regarding the commission of murder of the deceased by the appellant is tendered before the Court. The whole case against the appellant hinges on circumstantial evidence.

8. Before dealing with the circumstantial evidence on record, it would be profitable to refer to the well settled law relating to the circumstantial evidence. In dealing with circumstantial evidence, there is always a

danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances cannot fail. Therefore, many a times it is aptly said that "men may tell lies, but circumstances do not". In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established and all the facts so established, should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis except the one to be proved. There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, Court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is, or are not decisive. Where a case rests squarely on circumstantial evidence, the various sets of circumstantial evidence should be taken into consideration and their total effect should be such that they must lead unerringly to the guilt of the accused. Each fact must be proved individually and only, thereafter, the sum total of the proved facts has to be taken into consideration, but this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must prove each and every hypothesis suggested by the accused, however, extravagant and fanciful it might be. In Sharad v. State of Maharashtra, A.I.R. 1984 S.C. 1622, after referring to earlier case-law, the Supreme Court has summarized the conditions to be fulfilled in a case based on circumstantial evidence as under : (i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may" be established, (ii) the fact so established should be consistent only with the hypothesis of the guilt of the

accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (iii) the circumstances should be of conclusive nature and tendency; (iv) they should exclude every possible hypothesis except the one to be proved; (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused; and (vi) where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court.

9. If the aforesaid various conditions are fulfilled, only then a Court can use a false explanation or a false defence as an additional link and not otherwise. As observed earlier, if the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way. It has to consider the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and someof these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the court must have regard to the common course of natural events, to human conduct and their relations to the facts of the particular case.

10. In the light of the above referred to principles, we will now consider the question, whether the case against the appellant is proved or not.

11. The first circumstance sought to be proved by the prosecution against the appellant is that because of the one sided love expressed by the deceased for Haresh, who was running a Sweet Shop, at Mumbai, the relations between the appellant and the deceased were strained. In this regard, we find that witness Haresh Laxmidas P.W.2, Ex.10 has stated in examination in chief that he is running a Sweet Shop, at Andheri, at Mumbai and that he

was knowing the deceased as one of his customers. The witness has further stated that one and half year prior to the date of recording of his evidence, he had gone with Dr.Jayeshbhai to the residence of the appellant and found that the deceased Shantaben was lying on a bed. The witness has stated that Dr.Jayeshbhai had expressed his inability to treat Shantaben and, therefore, at the instance of the appellant, he had brought Dr.Balsara to the residence of the appellant. The witness has also stated that the telephone number of his residence is 8380321 and that one unknown person was telephoning him, but was not talking and, therefore, he had lodged a complaint with Telephone Department and Telephone Department had informed him that he was receiving telephone calls from the residence of the appellant. The witness has informed the Court that he had no relations with Shantaben nor he had any talk with Shantaben on telephone. According to the witness, the appellant had informed him on telephone that his wife had consumed some medicine, but not informed him that she had consumed poison. The witness admitted that he was receiving the telephone calls from the deceased and that he had also received a letter purportedly written by the deceased to him, but that he had not met the deceased, after receipt of the letter. The letter received by the witness is produced at Ex.30 on the record of the case. The evidence of Dr.Jayesh Ratilal Balsara, P.W.1, Ex.9 also shows that he was called by Haresh for examining Shantaben and that he had gone to the residence of the appellant for examining Shantaben. Further it is stated by him that after examining Shantaben, he had advised the appellant to remove Shantaben to a Hospital. In cross-examination, the witness has stated that Shantaben had complained about uneasiness, but he had not given any treatment to her. Further, the complainant has produced during his cross-examination, a letter written by the deceased to the appellant at Ex.17. In the said letter, the deceased had mentioned that there was difference of opinion between her and the appellant and that she was tendering her apology for the mistake committed by her. In the said letter, the deceased had also agreed to stay happily with the appellant emphasizing that the appellant would be entitled to divorce her, if the appellant was not satisfied with her conduct. A reasonable reading of the evidence of (i) complainant i.e. Mandan Gunasi, (ii) Dr.Jayesh Ratilal Balsara, and (iii) Haresh Laxmidas read together with contents of letters produced a Ex.13 and 17 establishes that the deceased had one sided love for witness Haresh, which had become known to the appellant, as a result of which the relations between the appellant and her were strained and that she had made an attempt to

commit suicide.

12. The second circumstance, which is sought to be relied upon by the prosecution, is that within 15 days of the attempt to commit suicide, the appellant had brought the deceased with him to his native village Samkhiyari from Mumbai. This fact stands amply established by the evidence of witness Mandan Gunasi, who is the father of the deceased. The witness has stated that there was a social function in the house of the father of the appellant and, therefore, the appellant had come to village Samkhiyari along with the deceased. This claim made by the Mandan Gunasi is not challenged by the defence at all. The evidence of witness Mandan Gunasi further proves that there was some social function in his house also situated at village Adhoi and, therefore, he had invited the appellant and the deceased at village Adhoi, but the said function was neither attended by the appellant nor by the deceased. Thus, the second circumstance relied upon by the prosecution is also established by it beyond pale of doubt.

13. The third circumstance, which is sought to be proved by the prosecution against the appellant is that on the fateful night, the appellant was all alone in the company of the deceased and had opportunity to commit the crime in question. In this regard the evidence led by prosecution establishes that the appellant had come from Mumbai with the deceased, his mother, deceased's two minor daughters and one sister-in-law. The evidence of Champuben Virji, P.W.15, Ex.37, who is mother-in-law of the deceased shows that Prabhaben, who is her daughter-in-law had also come to her house situated at village Samkhiyari and that in the morning of fateful day, the appellant had gone to railway station to bid her farewell. Her evidence further shows that she had gone to temple where chanting of Bhajans was arranged and that after dropping her daughter-in-law at the railway station, the appellant had come to temple and participated in the chanting of Bhajans. The witness has also stated that thereafter, they had gone to the house and found Shantaben dead. Thus at the time of the incident, the mother had gone to the temple, whereas sister-in-law of the appellant had already left for Mumbai and only two minor children were in the house. Therefore, in our view, it is satisfactorily established by the prosecution that at the time of incident, the appellant was with the deceased and had opportunity to commit the crime in question.

14. The next circumstance, relied upon by the

prosecution is that the deceased had not committed suicide. In this regard, the inquest panchnama and panchnama of place of occurrence are important. While preparing inquest panchnama ligature as well as other injuries sustained by the deceased were noticed. Those have been mentioned in detail in the panchnama. Further, the panchnama of the place of occurrence makes it evident that no rope tied with any part of the room in which the dead body was lying, was found and the panch witnesses have expressed weighty opinion that there was nothing in the room indicating suicide by the deceased. Further while preparing the panchnama of place of the incident, a blood stained coir string was found and the clothes of the deceased were also found to have been blood stained. Moreover, some of the clothes, which were recently washed, were found in burnt condition. The contents of the above referred to, two panchnamas make it manifest that the deceased had not committed suicide at all. We may state that the inquest panchnama stands amply proved by the evidence of Abdul Kadar Jusab Bhatti, P.W.18, Ex.42, who was then Executive Magistrate and had prepared the inquest panchnama at crematorium ground whereas the panchnama of the place of incident stands proved by the evidence of P.I. Shri Jadeja Ex.51. These two documents totally rule out the possibility of suicide by the deceased.

15. Yet another circumstance sought to be relied upon by the prosecution against the appellant is that the deceased had died a homicidal death. In this regard, we find that the postmortem examination of the dead body of the deceased was done by a penal of Doctors and that both the Doctors have been examined by the prosecution. Dr.Meghji Dhanji Shamalia, P.W.7, Ex.23 has stated in his evidence that the dead body of the deceased was received on February 23, 1993 at about 4.30 p.m. and as there was no sufficient light for examination of the dead body, the examination of the dead body was deferred to the next day. The Doctor has stated that the postmortem examination of the dead body was conducted on February 24, 1993 between 8.00 a.m. to 10.00 a.m. and that over and above, three ligature marks, seven other injuries were also found on the body of the deceased. The Doctor has stated that the deceased had died due to asphyxia resulting from strangulation of neck. In cross-examination, the witness has stated that after noticing the external injuries, burn injuries were also noticed. According to the Doctor, he had found if there is laceration on muscle as well as artery it and that laceration on two sides of the artery it would indicate that the death was not due to axphysia but due to reflex

cardiac arrest. The Doctor admitted that he had not examined the nails of the deceased and that if nails had been examined, he would have been able to state the correct cause of the death of the deceased. Further, the witness has stated that coir string produced as Muddamal article No.3 was never sent to him for his opinion and that if the same had been sent to him for examination he would have been in a position to state whether the ligature marks found on the dead body of the deceased were possible by the said string or not. However, in para-27 of his deposition the Doctor has maintained that cause of the death of the deceased was asphyxia resulting from strangulation. Though the Doctor admitted that in medical jurisprudence the strangulation may be homicidal, suicidal or accidental, he stated that the deceased had not caused ligature injuries to herself. After admitting that he has not stated the age of injuries in the P.M.Notes, the Doctor has mentioned that the deceased had sustained injuries prior to 12 to 18 hours of P.M. examination.

16. Dr.Nitin Virabhai Ninzoda, P.W.16, Ex.39 has also stated before the Court that the P.M. on the dead body of the deceased was conducted jointly by him and by Dr.Meghji Dhanji Shamalia and that the injuries as mentioned in the P.M. Notes were found on the dead body of the deceased. This Doctor has also opined that the death of the deceased was due to asphyxia resulting from strangulation of the neck. In his cross-examination, the Doctor stated that the tongue of a victim would not protrude in every case of strangulation. The Doctor has opined that the injuries, which were found over and above ligature injuries were not sufficient in the ordinary course of nature to cause the death of the deceased and those injuries might have contributed in causing the death of the deceased. According to the Doctor, the other injuries were possible if three different persons had assaulted the deceased. The injuries sustained by the deceased have been noticed in detail in the P.M. Notes and, therefore, it would be worthwhile to refer to the P.M. Notes in detail.

17. From the contents of the P.M.Notes, it is evident that the dead body of the deceased was identified by Mandan Gunsi, who is the father of the deceased. The teeth of the dead body were found in a closed conditions, whereas the P.M. Lividity was found to be present. P.M. Lividity was found on [i] Back of the trunk and [ii] flexus surface of the lower limb & extensal surface of the upper arm & over the gluteal region (both buttocks). The outer appearance of the dead body of the deceased as

noted in the P.M. Notes was as under :-

Face is puffy and conjested. Both eyes are partially open. Blood from both nostrils. Blood is mucus in characteristic. Tongue inside the mouth. Bleeding from the both ears. Conjectiva is conjested. Red pupil dilated. Cornea white muddy. Blood clot in the medial side of the left eye.

P.M. Burns :-

Over the both lower feet & upto calf muscle base - Pale No, Vesical and no line of redness.

In Column No.17 of the P.M.Notes, the following injuries have been mentioned.

"Ligature Mark :-

[i] 22 cm x 1 cm below Thyroid Cartilage. Transverse in direction 4 cm below the right angle mandible to 4 cm below left angle of mandible. Base Hard depress brownish. Margin - Echymosis, irregular and abrasion.

[ii] 6 cm x 1 cm below the left ear lobule to the centre of trachea. Base and margin same below ligature I. 1 cm diameter, 12 - abrasion mark.

[iii] Start from 2 cm below the (L) ear lobule to the middle of neck meeting ligature No.1. Base hard depress brown colour margin echymosis abrasion.

Injuries Mark :-

[i] 5 cm x 1 cm abrasion. Anterior side of right shoulder joint.

[ii] 6 cm diameter contusion over the chest. 3.4.5. rib & over sternum bone.

[iii] 6 cm x 2 cm contusion anterior surface of right thigh below iliac crest.

[iv] left chick 2 cm abrasion.

[v] 9 cm x 9 cm diameter contusion over the medial side and upper part of the left thigh."

18. Over and above, the above referred to, external

injuries, on internal examination the brain was found to be conjested and there was petechial haemorrhage. Further, the right lung was found to be markedly conjested and haemorrhage patches and petechiae were found. So far as the left lung is concerned "on section dark fluid blood was found". Further, slight laceration of the right and left sterno mastoid muscle and carotid arteries was found. The injuries noticed in the P.M. Notes make it abundantly clear that the deceased was done to death forcibly and had sustained other injuries also while offering resistance. A rash suggestion was made by the defence to both the Doctors that asphyxia can take place while having sexual intercourse to which both the Doctors have agreed. However, it is neither stated by the appellant in her further statement recorded under Section 313 of Code nor any evidence is led to establish that while having sex with the deceased, the neck of the deceased had got strangulated. Further other injuries found on the deceased do not stand explained merely because the Doctors have stated that sexual asphyxia as possible. Yet another foolish suggestion was made to the Doctors that the deceased was alive, when her postmortem examination was conducted. This suggestion would indicate that the two Doctors had killed the deceased but not the appellant without realising that the evidence on record establishes that the appellant himself had removed his wife to crematorium and lit the pyre which by itself would prove commission of offence by the appellant punishable under Section 307 of the Indian Penal Code if the suggestion made was correct. These baseless and wild suggestion will have to be ignored by the court. But having regard to the nature of medical evidence on record, we are of the firm opinion that the learned Judge of the trial Court did not commit any error in holding that it was proved by the prosecution beyond reasonable doubt that the deceased had died a homicidal death.

After strangulating the deceased to death the appellant had made systematic attempt to create alibi for him. From the evidence of his mother, it is manifest that the mother had gone to a temple to attend Bhajans whereas the appellant had gone to the railway station to bid farewell to his sister-in-law Prabhaben and had thereafter joined his mother at the temple. Thus a systematic attempt was made by the appellant to establish that he was not present in the house when the deceased was done to death.

19. The evidence on record further shows that after informing the complainant, who is father of the deceased about the death of the deceased, the appellant had not

waited for him at all and had removed the dead body to crematorium and lit the pyre. This fact amply stands proved by the evidence of the complainant - Mandan Gunsi as well as the evidence of Assistant Superintendent of Police Shri Tomar. Thus, there is no manner of doubt that the appellant had made a conscious attempt to see that the evidence regarding the commission of crime by him disappears. Having regard to the facts of the case, we are of the opinion that the circumstances, which are sought to be relied upon by the prosecution are satisfactorily proved and the cumulative effect of the proved circumstances establishes that the appellant had caused death of the deceased. The contention that it is not established by the prosecution that the Doctors had performed postmortem examination of the wife of the appellant is merely stated to be rejected. As is evident from the P.M.Notes themselves, the complainant who is father of the deceased had identified, the dead body as that of his daughter Shantaben. Further the card issued by Ghatkopar Maternity and Surgical Hospital is not signed by any doctor whereas the report of the serologist is admitted in evidence in view of the provisions of Section 293 of the Code of Criminal Procedure. The appellant had not requested the trial Court to summon the serologist for the purpose of cross-examination and has accepted the report. Under the circumstances, it is difficult to uphold the contention of the learned counsel for the appellant that in view of discrepancy regarding blood group of the deceased it should be held that the Doctors had not performed antopsy on the dead body of deceased Shantaben.

20. We notice that the Supreme Court in case of Vasa Chandra Shekhar v. Poona Satya Narayana (2000)6 SCC 286 and Geetha v. State of Karnataka (2000)10 SCC 72, while explaining law relating to circumstantial evidence, has ruled that where circumstances proved are put to the accused through his examination under Section 313 of the Code of Criminal Procedure and the accused merely denies the same, then such denial would be an additional link in the chain of circumstances to bring home the charge against the accused. As indicated earlier all circumstances proved were explained to the appellant and his further statement was recorded under Section 313 of the Code. Though the incriminating circumstances proved were put to the appellant, the appellant has merely denied the same and not offered any explanation at all. Therefore, such denial on the part of the appellant and non-explanation about the suspicious circumstances in which the deceased died, will have to be treated as an additional link in the chain of circumstances to bring

home the charge against the appellant. The cumulative effect of the circumstances proved above clearly establishes that in all human probability the act of commission of murder of the deceased was done by the appellant and the appellant alone. The circumstances proved establish guilt of the appellant beyond reasonable doubt. The conclusion drawn by the learned Judge of the trial Court who had advantage of observing the demeanor of the witnesses, to which we agree are consistent only with the guilt of the accused and are not consistent in any manner with the innocence of the appellant.

21. This brings us to the question as to what is the nature of offence committed by the appellant. It is well settled that culpable homicidal will amount to murder only if prosecution can prove that the case falls within any of the clauses, 1stly to 4thly of Section 300. Section 300, 3rdly requires firstly that the bodily injury must be intended and secondly that bodily injury intended must be sufficient in the ordinary course of nature to cause death. If the evidence on record establishes that the act was done with the knowledge that the accused was likely by his act to cause the death of the deceased then the case would fall within the third part of Section 299 and will be punishable under first part of Section 304 of Indian Penal Code as culpable homicide not amounting to murder. The sufficiency of the injuries to cause the death in the ordinary course of nature is something, which must be proved and cannot be inferred from the fact that the death has in fact, taken place. If there is no intention to cause the death then the act can be murder only if (i) the accused knew that the injuries inflicted were likely to cause death or (ii) that it would be sufficient in the ordinary course of nature to cause death or (iii) that the accused "knew" that the act "must" in all probability cause the death. If the case cannot be placed as high as that and the act is only likely to cause death and there is no special knowledge, the offence would be one punishable under Section 304 of the Indian Penal Code. As explained by the Supreme Court in case Harjinder Singh v. Delhi Administration, A.I.R. 1968 S.C. 867, the prosecution must prove the following facts before it can bring a case under Section 300 3rdly. First, it must establish, quite objectively that a bodily injury is present. Secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are

proved to be present, the enquiry proceeds further and fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

22. Applying the above referred to well settled principles to the facts of the present case, we find that Dr.Meghji Dhanji Shamalia, P.W.7, Ex.23 has not stated in his evidence before the Court that three ligature marks found on the dead body of the deceased were sufficient in the ordinary course of nature to cause death of the deceased. The evidence of Dr.Shamalia is not only shaky, but is incomplete to bring home the charge under Section 302 of the Indian Penal Code against the appellant. As observed earlier, this Doctor has stated that during the course of postmortem examination, he had found laceration on muscle as well as artery and that if two sides of artery are lacerated then death would take place because of reflex cardiac arrest. Further, the Doctor has stated that he had not examined nail of the deceased and that if he had examined the nails, he would have been able to state accurately the cause of death of the deceased. Moreover, as per his own admission, the coir string used in commission of crime was not sent for his opinion and he has stated that if the string had been examined, he would have been able to say that whether the ligature marks found on the dead body were by the said string. At one stage, he has stated that all the three ligature injuries were caused at different times whereas in para-49 of his deposition he has stated that he was not able to say whether ligature injuries No.1 and 2 were caused at different times or at the same time. He had also not noticed the age of each of the injuries sustained by the deceased. Thus it is very difficult to conclude from the evidence of this Doctor that the prosecution has proved beyond reasonable doubt that the ligature injuries caused by the appellant were sufficient in the ordinary course of nature to cause the death of the deceased. So far as the evidence of Dr.Nitin Virabhai Vinzoda, P.W.16, Ex.39 is concerned, we find that this Doctor has also not stated in his substantive evidence before the Court that the ligature injuries sustained by the deceased were sufficient in the ordinary course of nature to cause her death. In the cross-examination, the witness has stated that in medical science there is nothing like self suicide. He has in terms stated before the court that he does not know as to what is self strangulation. He did not agree with the

suggestion made by the defence that self strangulation is always suicidal. He has admitted that he had never learnt in his carrier about the self strangulation. This is the expertise which the expert claims to possess with regard to subject of self strangulation and with reference to this kind of evidence on the record, the Court has to determine the question whether it is proved by the prosecution beyond reasonable doubt that the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause her death. Further in para-25 of his deposition the witness has in terms stated that the other injuries over and above the ligature injuries, which were found on the dead body of the deceased, might have contributed in causing her death. This Doctor has specifically stated that the other injuries could have been caused if different weapons had been used by the same person. Further what is stated by the Doctor in para-25 is that the other injuries could have been caused to the deceased if she had been assaulted by three different persons with hard and blunt substance. What is claimed by the prosecution in the present case is that the appellant had caused ligature injuries to the deceased. It is not the case of the prosecution that the appellant had caused other injuries also to the deceased which were found by a penal of doctors while performing the antopsy. Thus, the evidence on record does not satisfactorily establish that the ligature injuries caused by the appellant to the deceased were sufficient in the ordinary course of nature to cause her death. However, there is no manner of doubt that the appellant had knowledge that his act of strangulating the deceased was likely to cause her death and, therefore, in our view the offence committed by the appellant would be one punishable under Section 304, Part-I of the Indian Penal Code and not under Section 302 of the Indian Penal Code, as held by the learned Judge of the trial Court.

22. For the foregoing reasons, the appeal partly succeeds. The finding recorded by the learned Judge that the appellant had caused the death of the deceased by strangulating her, is confirmed, but having regard to the facts of the case his conviction under Section 302 as well as sentence imposed, therefor, is set side. Instead the appellant is convicted under Section 304, Part-I IPC. His conviction under Section 201 of the Indian Penal code being well founded is hereby confirmed. The learned counsel for the appellant has stated at the Bar that with remission the appellant has undergone sentence of 9 years. The learned APP has produced the Jail remarksheet of the appellant for perusal of the Court, wherein it is mentioned that by this time the appellant has undergone

imprisonment for 9 years and 10 months including the set off. Having regard to the facts of the case, we are of the opinion that the interest of justice would be served, if the appellant is sentenced to imprisonment which he has already undergone by this time. Accordingly, for the offence punishable under Section 304, Part-I of the I.P.C. the appellant is sentenced to imprisonment which he has already undergone. In the beginning of the judgment we have observed that the learned Judge has directed that the substantive sentences shall run concurrently and, therefore, there is no manner of doubt that the appellant has undergone sentence imposed on him for the offence punishable under Section 201 of the I.P.C. As the appellant has undergone sentence imposed on him for the offences punishable under Section 304, Part-I as well as Section 201 of the Indian Penal Code, the Jail Authority are directed to release him forthwith unless his presence is needed with reference to any other case. The appeal accordingly stands partly allowed. Muddamal to be disposed of in terms of directions given in the impugned judgment. Direct service is permitted.

Sd/-
(J.M.Panchal,J.)

Sd/-
(H.H.Mehta,J.)

(panchal)